



UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, DC

Issued by the Department of Transportation
on the 17th day July, 1998

Served: July 22, 1998

Application of

DELTA AIR LINES, INC.

for a waiver from the dormancy conditions
applicable to its U.S.-Mexico Exemption
Authority

Docket OST-97-3289

ORDER GRANTING WAIVER

Summary

By this order we grant the request of Delta Air Lines, Inc. (Delta), for a waiver of the dormancy conditions for certain of its U.S.-Mexico exemption authority so that the dormancy notice period for the subject U.S.-Mexico markets will begin August 15, 1998, Delta's new proposed start-up date for these services.

Background

On March 20, 1998, the Department granted certain exemption authority to Delta for services in various U.S.-Mexico markets, to be operated pursuant to a code-share arrangement with Aerovias de Mexico, S.A. de C.V. (Aeromexico).¹ The Department subjected Delta's authority to the standard dormancy conditions routinely imposed on all U.S.-Mexico route authority granted to U.S. carriers.²

¹ See Order 98-6-2.

² U.S.-Mexico exemption authority is subject to the dormancy notice requirements set forth in condition 7 of Appendix A of Order 88-10-2, which requires carriers to file notice with the Department when a city-pair market is dormant for more than 90 days.

Application, Responsive Pleadings and Subsequent Events

On June 15, 1998, Delta filed an application requesting a waiver from the dormancy conditions for certain of the U.S.-Mexico exemption authority granted March 20, 1998.³ Delta states that it would not begin its services under the exemption until after the 90-day dormancy period expired (June 18, 1998).⁴ Delta states, further, that it has firm plans to implement service in the subject markets no later than August 15, 1998, and that it seeks a waiver of the dormancy conditions to begin calculation of the dormancy period on its new proposed start-up date.⁵

On June 18, 1998, the Department issued a Notice, granting Delta a temporary waiver of the dormancy conditions through July 2, 1998, to provide interested parties sufficient time to submit answers to the request and for the Department to consider any answers filed.⁶

On June 24, 1998, American Airlines, Inc. (American), filed an answer to Delta's application, stating that the dormancy conditions are not applicable to Delta's authority in this case, and that Delta's application for waiver should be dismissed as unnecessary. American argues that the dormancy conditions apply only to U.S.-Mexico city-pair markets where service has been discontinued for 90 days or where the decision has been made not to inaugurate service.⁷

On July 1, 1998, Delta filed a reply to American's answer, stating that Delta's only concern is to preserve its authority to provide code-share services. Delta urges the Department to grant the requested waiver promptly or, in the alternative, to issue a notice confirming that the dormancy conditions do not apply in this case.

³ The specific city pairs for which a waiver is requested are: Atlanta-Los Cabos; Atlanta-Mazatlan; Atlanta-Ixtapa/Zihuatanejo; Atlanta-La Paz; Atlanta-Oaxaca; Atlanta-Culiacan; Atlanta-Chihuahua; Atlanta-Hermosillo; Atlanta-Durango; Atlanta-Veracruz; Dallas/Ft. Worth-Ixtapa/Zihuatanejo; Dallas/Ft. Worth-La Paz; Dallas/Ft. Worth-Oaxaca; Dallas/Ft. Worth-Culiacan; Dallas/Ft. Worth-Veracruz; Los Angeles-Oaxaca; Los Angeles-Culiacan; Los Angeles-Chihuahua; Los Angeles-Veracruz; New York-La Paz; New York-Oaxaca; New York-Culiacan; New York-Chihuahua; New York-Veracruz.

⁴ The dormancy period in this matter was calculated 90 days from the date the route authority was granted.

⁵ In support of its request, Delta states that it has been standard practice of the Department to begin the dormancy period with respect to U.S.-Mexico authority on the applicant's proposed start-up date for service (e.g., Notice Of Action Taken dated January 7, 1998, Docket OST-97-3272).

⁶ Under the Department's regulations, answers to the waiver application would normally have been due on June 24, 1998, six days after Delta's 90-day dormancy period ended.

⁷ American states that it also holds U.S.-Mexico exemption authority for code-share services and that it, too, has been precluded from inaugurating certain of its services due to the "failure of the Mexican Government to grant necessary approvals." American argues that, under these circumstances, it would be unfair to impose the dormancy conditions.

Given the imminent expiration of Delta's temporary dormancy waiver granted June 18, the Department on July 1, 1998, extended the temporary waiver of the dormancy conditions granted Delta through July 17, 1998, to afford the Department sufficient time to consider the pleadings in this case.

Decision

We have decided to grant Delta's request for a waiver of the dormancy conditions in this matter. The dormancy notice period for the subject U.S.-Mexico markets will begin August 15, 1998, Delta's new proposed start-up date for these services.⁸

We have reviewed Delta's request and find that grant of the waiver is consistent with the public interest. Delta has requested only a short-term extension of the dormancy period and it appears clear from its pleadings that it has firm near-term plans to serve the markets at issue. Further, no party has substantively opposed Delta's request for waiver. In these circumstances, we find that Delta has provided sufficient information to justify the grant of a waiver of the dormancy conditions so that the carrier can commence services on August 15, as planned.

Regarding American's comments, we have concluded that the dormancy conditions do indeed apply to Delta's authority here. Services in the U.S.-Mexico market are limited by the number of U.S. carriers that may serve a U.S.-Mexico city-pair market. In light of these limitations, in 1988, the Department established special procedures applicable to U.S.-Mexico route authorities to ensure that the limited route rights would be available quickly for carriers that wanted to use them.⁹ Consistent with this goal, the Department determined that all U.S.-Mexico exemption authority should be subject to strict dormancy conditions. Those conditions, established in Order 88-10-2, Appendix A, Condition 7 require carriers to notify the Department as follows:

(7) File notice with the Department when discontinuing service on a route or city pair for 90 days or longer. This notice shall be given as soon as the decision not to inaugurate service or to discontinue service (other than seasonally) is made, but in no case later than the 91st day of dormancy.

Delta's Mexico authority is subject to this condition.

Furthermore, for the purposes of U.S.-Mexico route authority, the Department has defined dormancy as follows: "a city-pair will be deemed dormant if no U.S.-flag nonstop

⁸ Thus, the route authorities encompassed by Delta's request will be dormant November 14, 1998, unless Delta commences services by that date or applies for and is granted further relief from the dormancy conditions.

⁹ Orders 88-7-43 and 88-10-30 (In the Matter of U.S.-Mexico Air Transportation Operations, Docket 45728).

service, or no U.S.-flag one-stop service via a Mexico point, is provided in the city-pair market for 90 days....”¹⁰

Our consistent practice in applying the dormancy conditions for U.S.-Mexico services has been that (except where seasonal service is involved), any time a carrier does not provide service for 90 days¹¹ in a city-pair market for which it holds authority (whether the carrier has or has not ever entered the market, or whether the carrier has or has not made a definitive decision regarding future entry), the authority is deemed dormant and cannot be used unless the carrier has specifically requested and been granted a waiver and/or extension of the dormancy provisions. American has not persuaded us that the continued application of this policy is inappropriate in this case.¹²

American suggested that dormancy conditions serve no purpose with respect to U.S.-Mexico code-share services since the Department has already established a policy whereby code-share authority is subject to replacement at any time by direct-carrier service (where a carrier proposes to use its own aircraft) in a given market. However, the direct carrier services condition does not replace the dormancy condition, and in fact the two conditions serve different purposes. The latter goes to enhancing the likelihood that markets will be served, whereas the former goes to the issue of the type of service that markets will receive. Plainly, then, the public interest calls for application of the dormancy condition in the present case.

ACCORDINGLY,

1. We grant the request of Delta Air Lines, Inc., for a waiver of the dormancy provisions with respect to the U.S.-Mexico route authority described in this order to the extent necessary to permit Delta Air Lines, Inc., to delay the start-up of services in the markets described until August 15, 1998;
2. The U.S.-Mexico route authority encompassed in ordering paragraph 1, above, shall become dormant November 14, 1998, unless Delta Air Lines, Inc., commences services by that date or applies for and is granted further relief from the dormancy conditions imposed on this authority;

¹⁰ Order 88-10-30 at 4. At the time, only one U.S. carrier was permitted to serve a given U.S.-Mexico city-pair market under Annex 1 of the U.S.-Mexico aviation agreement. Since then, the Annex has been amended to permit up to two U.S. carriers on any U.S.-Mexico city-pair market, and the dormancy definition applies respectively to each carrier serving the city-pair market.

¹¹ Calculation of the 90-day dormancy period begins on the date of the carrier’s proposed start-up for service, or on the date the carrier is awarded the authority (where a carrier has immediate plans for service). Once service has been inaugurated, calculation of the 90-day dormancy period begins from the date service is ceased.

¹² In its answer, American indicates that many of its own U.S.-Mexico code-share markets are dormant at this time. Should the carrier wish to retain this authority, American must file for the appropriate relief. In considering any such requests, we will of course take into account the circumstances presented, including any confusion that may have existed regarding our applicable requirements.

3. To the extent not granted, we deny the request for waiver in this docket;
4. We may amend, modify, or revoke the authority granted in this Order at any time without hearing at our discretion; and
5. We will serve a copy of this Order on all parties in the captioned docket.

Persons entitled to petition the Department for review of the action set forth in this order under the Department's regulations, 14 CFR §385.30, may file their petitions within ten (10) days after the issuance of this order. This action was effective when taken, and the filing of a petition for review will not alter such effectiveness.

By:

PAUL L. GRETCH
Director
Office of International Aviation

(SEAL)

*An electronic version of this order is available on the World Wide Web at
<http://dms.dot.gov/general/orders/aviation.html>*